UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)

1. SEE NOTICE ON REVERSE **2. PLEASE TYPE OR PRINT** **3. STAPLE ALL ADDITIONAL PAGES**

Case Caption:	District Court or Agency:	Judge:
James G. Paulsen, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board Plaintiff-Appellee/Cross-Appellant vs. Primeflight Aviation Services, Inc. Defendant - Appellant/Cross-Appellee	EDNY (Brooklyn)	Brian Cogan
	Date the Order or Judgment Appealed from was Entered on the Docket: 10/24/16, 12/13/16	District Court Docket No.: 16-cv-5338
	Date the Notice of Appeal was Filed: 1/3/17	Is this a Cross Appeal? ☑ Yes ☐ No

	Counsel's Name:	Address:	Telephone No.:	Fax No.:	E-mail:
Attorney(s) for Appellant(s): ☑ Plaintiff ☐ Defendant	Jonathan M. Psotka	NLRB, Division of Advice 1015 Half St. SE Washington, D.C. 20570	(202) 273-2890	(202) 273-4275	jonathan.psotka@nlrb.gov
	Laura T. Vazquez	NLRB, Division of Advice 1015 Half St. SE Washington, D.C. 20570	(202) 273-3832	(202) 273-4275	laura.vazquez@nlrb.gov
Attorney(s) for Appellee(s): ☐ Plaintiff ☒ Defendant	Christopher C. Murray Ogletree Deakins Law Firm 111 Monument Cir. Suite 4600, Indianapolis, IN 46260		317-916-1300	317-916-9076	chris.murray@odnss.com

Has Transcript Been Prepared?	Approx. Number of Transcript Pages:	Number of Exhibits Appended to Transcript:	Has this matter been before this Circuit previously? ☐ Yes ☑ No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (i.e., F.3d or Fed. App.)
Yes	42	None	

***ADDENDUM "A"*: COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; (3) A COPY OF THE NOTICE OF APPEAL AND A CURRENT COPY OF THE LOWER COURT DOCKET SHEET; AND (4) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS APPEAL, INCLUDING TRANSCRIPTS OF ORDERS ISSUED FROM THE BENCH OR IN CHAMBERS.**

***ADDENDUM "B"*: COUNSEL MUST ATTACH TO THIS FORM A LIST OF THE ISSUES PROPOSED TO BE RAISED ON APPEAL, AS WELL AS THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.**

PART A: JURISDICTION

1. Federal Jurisdiction		2. Appellate Jurisdiction	
☑ U.S. a party	☐ Diversity	☑ Final Decision	☐ Order Certified by District Judge (i.e., Fed . R. Civ. P. 54(b))
☐ Federal question (U.S. not a party)	☐ Other (specify): _____	☐ Interlocutory Decision Appealable As of Right	☐ Other (specify): _____

IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.

PART B: DISTRICT COURT DISPOSITION (Check as many as apply)

1. Stage of Proceedings

- ☐ Pre-trial
- ☐ During trial
- ☑ After trial

2. Type of Judgment/Order Appealed

- ☐ Default judgment
- ☐ Dismissal/FRCP 12(b)(1) lack of subject matter juris.
- ☐ Dismissal/FRCP 12(b)(6) failure to state a claim
- ☐ Dismissal/28 U.S.C. § 1915(e)(2) frivolous complaint
- ☐ Dismissal/28 U.S.C. § 1915(e)(2) other dismissal
- ☐ Dismissal/other jurisdiction
- ☐ Dismissal/merit
- ☑ Judgment / Decision of the Court
- ☐ Summary judgment
- ☐ Declaratory judgment
- ☐ Jury verdict
- ☐ Judgment NOV
- ☐ Directed verdict
- ☐ Other (specify):

3. Relief

- ☐ Damages:
  - ☐ Sought: $ _____
  - ☐ Granted: $ _____
  - ☐ Denied: $ _____
- ☑ Injunctions:
  - ☑ Preliminary
  - ☐ Permanent
  - ☐ Denied

PART C: NATURE OF SUIT (Check as many as apply)

1. Federal Statutes

- ☐ Antitrust
- ☐ Bankruptcy
- ☐ Banks/Banking
- ☐ Civil Rights
- ☐ Commerce
- ☐ Energy
- ☐ Commodities
- ☐ Other (specify): _____
- ☐ Communications
- ☐ Consumer Protection
- ☐ Copyright □ Patent
- ☐ Trademark
- ☐ Election
- ☐ Soc. Security
- ☐ Environmental
- ☐ Freedom of Information Act
- ☐ Immigration
- ☑ Labor
- ☐ OSHA
- ☐ Securities
- ☐ Tax

2. Torts

- ☐ Admiralty/ Maritime
- ☐ Assault / Defamation
- ☐ FELA
- ☐ Products Liability
- ☐ Other (Specify):

3. Contracts

- ☐ Admiralty/ Maritime
- ☐ Arbitration
- ☐ Commercial
- ☐ Employment
- ☐ Insurance
- ☐ Negotiable Instruments
- ☐ Other Specify

4. Prisoner Petitions

- ☐ Civil Rights
- ☐ Habeas Corpus
- ☐ Mandamus
- ☐ Parole
- ☐ Vacate Sentence
- ☐ Other

5. Other

- ☐ Hague Int'l Child Custody Conv.
- ☐ Forfeiture/Penalty
- ☐ Real Property
- ☐ Treaty (specify): _____
- ☐ Other (specify): _____

6. General

- ☐ Arbitration
- ☐ Attorney Disqualification
- ☐ Class Action
- ☐ Counsel Fees
- ☐ Shareholder Derivative
- ☐ Transfer

7. Will appeal raise constitutional issue(s)?

☐ Yes ☑ No

Will appeal raise a matter of first impression?

☐ Yes ☑ No

1. Is any matter relative to this appeal still pending below? ☐ Yes, specify: _____ ☑ No

2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:

(A) Arises from substantially the same case or controversy as this appeal? ☑ Yes ☐ No

(B) Involves an issue that is substantially similar or related to an issue in this appeal? ☐ Yes ☑ No

If yes, state whether □ "A," or □ "B," or □ both are applicable, and provide in the spaces below the following information on the *other* action(s):

Case Name:	Docket No.	Citation:	Court or Agency:
In re Primeflight Aviation Services, Inc.	29-CA-177992 et al.		NLRB

Name of Appellant: James G. Paulsen, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board

Date: 1/12/2017

Signature of Counsel of Record: /s Jonathan M. Psotka

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court, you have only 14 days in which to complete the following important steps:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Second Circuit in accordance with LR 25.1.
3. Pay the$505 docketing fee to the United States District Court or the $500 docketing fee to the United States Tax Court unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 DAYS, YOUR APPEAL WILL BE DISMISSED. *SEE* LOCAL RULE 12.1.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CIVIL APPEAL PRE-ARGUMENT STATEMENT

ADDENDUM "A" to Form C

(1) Nature of the Action

This is a cross-appeal from the October 24, 2016 final order and the December 13, 2016 memorandum decision and order of the District Court for the Eastern District of New York (J. Cogan) denying in part the Regional Director's request for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(j). The Director sought injunctive relief under that section pending the resolution of an administrative complaint before the National Labor Relations Board ("the Board"). Based on the unfair labor practice complaint before the Board, the Director's petition alleged that there is reasonable cause to believe that Primeflight Aviation Services, Inc. was a successor employer and, therefore, had an obligation to recognize and bargain with the Service Employees International Union, Local 32BJ, and provide information necessary for

bargaining. The petition further alleged that Primeflight's actions have a deleterious effect on employees' union activities and threatens irreparable harm to employees' willingness to exercise their rights under the Act. The Regional Director alleged that, therefore, interim relief under Section 10(j) while the administrative case is pending is "just and proper" to prevent irreparable harm and protect the Board's ultimate remedial authority in the administrative case. For this reason, the petition sought an order requiring Primeflight to, *inter alia*, recognize and bargain with the Union on an interim basis, and cease and desist from refusing to bargain in good faith with the Union, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(2) Result Below

The district court granted the Director's petition in large part on October 24, 2016 and entered a preliminary injunction. While the district court found reasonable cause to believe that Primeflight committed the alleged unfair labor practices, and that

a bargaining order was just and proper, the court ruled that any bargaining agreement between the parties could not include any provisions regarding the minimum number of shifts per employee or minimum staffing levels per shift. The injunction also did not include the requested "cease and desist" language.

On November 21, 2016, the Director filed a motion to alter the judgment pursuant to Federal Rule of Civil Procedure 59(e), requesting that the district court remove the bargaining limitation and add the cease and desist language. On December 13, 2016, the district court denied the Director's motion.

Attachments to the Addendum

1. Notice of Cross Appeal
2. District Court Docket Sheet
3. District Court October 24, 2016 Memorandum Decision and Order
4. District Court October 24, 2016 Preliminary Injunction
5. District Court December 13, 2016 Memorandum Decision and Order

ADDENDUM "B" to Form C

List of Proposed Issues

The issues before the Court in this cross-appeal are whether the district court abused its discretion in imposing limits on the subjects of bargaining in its interim bargaining order, and also in not including cease and desist language in the preliminary injunction.

Appellate Standard of Review

This Court reviews de novo the district court's legal conclusions, including its "reasonable cause" determination, and reviews a district court's determination of whether relief was just and proper for abuse of discretion. *Hoffman v. Inn Credible Caterers, Inc.*, 247 F.3d 360, 364 (2d Cir. 2001).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner	)	16 Civ. 5338 (BMC)
v.	)	
PRIMEFLIGHT AVIATION SERVICES, INC.,	)	
Respondent	)	

NOTICE OF CROSS APPEAL

Notice is hereby given that Petitioner National Labor Relations Board appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered October 24, 2016 and from the post-judgment order entered in this action on December 13, 2016.

Respondent PrimeFlight Aviation Services, Inc., filed a Notice of Appeal from the Preliminary Injunction on November 17, 2016, which has been docketed in the Second Circuit as Case 16-3877.

Respectfully submitted on January 3, 2017

/s/ Brady Francisco-FitzMaurice
Brady Francisco-FitzMaurice
Counsel for Petitioner,
Regional Director for Region 29 of the National Labor Relations Board
Two Metro Tech Center, Fifth Floor
Brooklyn, New York 11201
(718) 765-6192

APPEAL

U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #: 1:16-cv-05338-BMC

Paulsen v. Primeflight Aviation Services, Inc.
Assigned to: Judge Brian M. Cogan
Cause: 29:160(1) National Labor Relations Act

Date Filed: 09/26/2016
Date Terminated: 01/01/2017
Jury Demand: None
Nature of Suit: 720 Labor: Labor/Mgt. Relations
Jurisdiction: U.S. Government Plaintiff

Plaintiff

James G. Paulsen
Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board

represented by **Brady Francisco-FitzMaurice**
National Labor Relations Board
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LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

V.

Defendant

Primeflight Aviation Services, Inc.

represented by **William Franklin Birchfield**
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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/26/2016	1	COMPLAINT *(Petition for Temporary Injunction)* against Primeflight Aviation Services, Inc., filed by James G. Paulsen. (Attachments: # 1 Civil Cover Sheet) (Davis, Kimberly) (Additional attachment(s) added on 9/27/2016: # 2 Exhibit A-R) (Davis, Kimberly). (Entered: 09/26/2016)
09/26/2016	2	Unsigned Order to Show Cause by James G. Paulsen (Davis, Kimberly) (Entered: 09/26/2016)
09/26/2016	3	MEMORANDUM in Support re 1 Complaint (Petition for Injunction) filed by James G. Paulsen. (Davis, Kimberly) (Entered: 09/26/2016)
09/26/2016	4	MOTION for Leave to Appear Pro Hac Vice *(Brady Francisco-FitzMaurice)* by James G. Paulsen. (Davis, Kimberly) (Entered: 09/26/2016)
09/26/2016	5	MOTION for Preliminary Injunction *(Exhibits to be filed)* by James G. Paulsen. (Attachments: # 1 Proposed Order, # 2 Affidavit) (Davis, Kimberly) (Entered: 09/26/2016)
09/26/2016	6	In accordance with Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, the parties are notified that ***if*** all parties consent a United States magistrate judge of this court is available to conduct all proceedings in this civil action including a (jury or nonjury) trial and to order the entry of a final judgment. Attached to the Notice is a blank copy of the consent form that should be filled out, signed and filed electronically **only if all** parties wish to consent. The form may also be accessed at the following link: http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf. **You may withhold your consent without adverse substantive consequences**. **Do NOT return or file the consent unless all parties have signed the consent.** (Davis, Kimberly) (Entered: 09/26/2016)
09/27/2016	7	ORDER TO SHOW CAUSE dated 9/26/16 that respondent show cause why a temporary injunction should not issue. Show Cause Hearing set for 10/6/2016 at 02:15 PM in Courtroom 8D South before Judge Brian M. Cogan. See Order for further complete details.(Ordered by Judge Brian M. Cogan on 9/26/2016) (Guzzi, Roseann) (Entered: 09/27/2016)
09/27/2016		ORDER granting 4 Brady Francisco-Fitzmaurice's Motion for Leave to Appear Pro Hac Vice as counsel for petitioner. The attorney shall register for ECF, registration is available online at the NYEDs homepage. Once registered, the attorney shall file a notice of appearance and ensure that he receives electronic notification of activity in this case. Also, the attorney shall ensure that the $150 admission fee be submitted to the Clerk's Office. Ordered by Judge Brian M. Cogan on 9/27/2016. (Weisberg, Peggy) (Entered: 09/27/2016)
09/28/2016	8	CERTIFICATE OF SERVICE by James G. Paulsen (Francisco-FitzMaurice, Brady) (Entered: 09/28/2016)
09/28/2016	9	Letter *seeking clarification of Judge Cogan's September 26, 2016 Order to Show Cause* by

		Primeflight Aviation Services, Inc. (Birchfield, William) (Entered: 09/28/2016)
09/28/2016		ORDER re 9 . There is no need for "clarification." Local Rule 6.1 is expressly subject to "direction in a particular case." This is a 10j petition where the normal time periods are frequently shortened by Order to Show Cause. This Court's Order to Show Cause could not be more clear that the answer to the petition is due 10/3 at 5 pm. If respondent wants to change the time table, it can make a motion to do so. Better yet, it can do what reasonable parties usually do and confer with petitioner and submit an agreed schedule to the Court. Ordered by Judge Brian M. Cogan on 9/28/2016. (Weisberg, Peggy) (Entered: 09/28/2016)
09/29/2016	10	Amicus Curiae APPEARANCE entered by Jessica Drangel Ochs on behalf of SEIU Local 32BJ (Ochs, Jessica) (Entered: 09/29/2016)
09/29/2016	11	MEMORANDUM in Support *Memorandum of Law In Support of Motoin For Leave to Appear as Amicus Curiae* filed by SEIU Local 32BJ. (Ochs, Jessica) (Entered: 09/29/2016)
09/29/2016	12	Notice of MOTION for More Definite Statement *Notice of Motion For Leave To Participate As Amicus Curiae* by SEIU Local 32BJ. (Ochs, Jessica) (Entered: 09/29/2016)
09/29/2016		ORDER granting in part 12 Motion. SEIU may file a brief as amicus. The Court reserves decision on whether and to what degree it will be permitted to participate in the case beyond that. Ordered by Judge Brian M. Cogan on 9/29/2016. (Weisberg, Peggy) (Entered: 09/29/2016)
09/29/2016	13	NOTICE of Appearance by William Franklin Birchfield on behalf of Primeflight Aviation Services, Inc. (aty to be noticed) (Birchfield, William) (Entered: 09/29/2016)
09/29/2016	14	Letter MOTION for Extension of Time to File Response/Reply as to 7 Order to Show Cause, by Primeflight Aviation Services, Inc.. (Birchfield, William) (Entered: 09/29/2016)
09/29/2016		ORDER re: 14 . Petitioner to respond in detail why it is unable to agree to a reasonable schedule with respondent by 1:00 p.m. on 9/30/16. Ordered by Judge Brian M. Cogan on 9/29/2016. (Weisberg, Peggy) (Entered: 09/29/2016)
09/30/2016	15	Letter *regarding Respondent's request for an extension of time* by James G. Paulsen (Francisco-FitzMaurice, Brady) (Entered: 09/30/2016)
09/30/2016		ORDER re: 14 and 15 . Respondent has until 10/7/2016 to file its answer to petitioner's motion, and the hearing date is reset to 10/11/2016 at 10:00 am in Courtroom 8D South. Amicus also has until 10/7/2016 to file any papers. Ordered by Judge Brian M. Cogan on 9/30/2016. (Weisberg, Peggy) (Entered: 09/30/2016)
09/30/2016	16	NOTICE of Appearance by Brent Garren on behalf of SEIU Local 32BJ (aty to be noticed) (Garren, Brent) (Entered: 09/30/2016)
10/07/2016	17	MOTION for Leave to File *Supplemental Evidence* by SEIU Local 32BJ. (Attachments: # 1 Declaration Declaration of Tessa Lopes Francis with exhibit) (Garren, Brent) (Entered: 10/07/2016)
10/07/2016	18	MEMORANDUM in Support *of Petition For Preliminary Injunction* filed by SEIU Local 32BJ. (Garren, Brent) (Entered: 10/07/2016)
10/07/2016	19	ANSWER to 1 Complaint, by Primeflight Aviation Services, Inc.. (Birchfield, William) (Entered: 10/07/2016)
10/07/2016	20	MEMORANDUM in Opposition *to Petitioner's Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act* filed by Primeflight Aviation Services, Inc.. (Birchfield, William) (Entered: 10/07/2016)

10/07/2016	21	AFFIDAVIT/DECLARATION in Opposition re 5 MOTION for Preliminary Injunction *(Exhibits to be filed)* filed by Primeflight Aviation Services, Inc.. (Attachments: # 1 Exhibit Exhibit 1) (Birchfield, William) (Entered: 10/07/2016)
10/07/2016	22	AFFIDAVIT/DECLARATION in Opposition re 5 MOTION for Preliminary Injunction *(Exhibits to be filed)* filed by Primeflight Aviation Services, Inc.. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3) (Birchfield, William) (Entered: 10/07/2016)
10/07/2016	23	AFFIDAVIT/DECLARATION in Opposition re 5 MOTION for Preliminary Injunction *(Exhibits to be filed)* filed by Primeflight Aviation Services, Inc.. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2) (Birchfield, William) (Entered: 10/07/2016)
10/12/2016		Minute Entry and Order for hearing held before Judge Brian M. Cogan on 10/11/2016. Petitioner, respondent, and amicus curiae all present. The Court heard oral arguments on the petition for a preliminary injunction. The Court reserves judgment. See transcript for details. (CR: Anthony Frisolone). (Weisberg, Peggy) (Entered: 10/12/2016)
10/24/2016	24	MEMORANDUM DECISION AND ORDER dated 10/24/16 that the 5 Motion for Preliminary Injunction is granted in part. The terms of the preliminary injunction as set forth above will be issued separately. (Ordered by Judge Brian M. Cogan on 10/24/2016) (Guzzi, Roseann) (Entered: 10/24/2016)
10/24/2016	25	PRELIMINARY INJUNCTION.(Ordered by Judge Brian M. Cogan on 10/24/2016) (Guzzi, Roseann) (Entered: 10/24/2016)
10/27/2016	26	CERTIFICATE OF SERVICE by James G. Paulsen re 25 Preliminary Injunction, 24 Order on Motion for Preliminary Injunction, (Francisco-FitzMaurice, Brady) (Entered: 10/27/2016)
11/09/2016	27	AFFIDAVIT/AFFIRMATION *of William Stejskal* by Primeflight Aviation Services, Inc. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2) (Birchfield, William) (Entered: 11/09/2016)
11/17/2016	28	NOTICE OF APPEAL as to 25 Preliminary Injunction by Primeflight Aviation Services, Inc.. Filing fee $ 505, receipt number 0207-9073280. (Birchfield, William) (Entered: 11/17/2016)
11/17/2016		Electronic Index to Record on Appeal sent to US Court of Appeals. 28 Notice of Appeal Documents are available via Pacer. For docket entries without a hyperlink or for documents under seal, contact the court and we'll arrange for the document(s) to be made available to you. (McGee, Mary Ann) (Entered: 11/17/2016)
11/21/2016	29	Emergency MOTION to Alter Judgment *Pursuant to Fed. R. Civ. P. 59(e)* by James G. Paulsen. (Attachments: # 1 Memorandum in Support, # 2 Declaration, # 3 Certificate of Service) (Francisco-FitzMaurice, Brady) (Entered: 11/21/2016)
11/21/2016		ORDER re 29 Motion to Alter Judgment. Respondent PrimeFlight is ordered to respond to the NLRB's motion by 12/1/2016. Ordered by Judge Brian M. Cogan on 11/21/2016. (Shami, Amanda) (Entered: 11/21/2016)
12/01/2016	30	RESPONSE in Opposition re 29 Emergency MOTION to Alter Judgment *Pursuant to Fed. R. Civ. P. 59(e)* filed by Primeflight Aviation Services, Inc.. (Birchfield, William) (Entered: 12/01/2016)
12/01/2016	31	MOTION to Stay re 7 Order to Show Cause, *and/or Suspend Injunction Pending Appeal* by Primeflight Aviation Services, Inc.. (Birchfield, William) (Entered: 12/01/2016)
12/01/2016	32	MEMORANDUM in Support re 31 MOTION to Stay re 7 Order to Show Cause, *and/or*

		Suspend Injunction Pending Appeal filed by Primeflight Aviation Services, Inc.. (Birchfield, William) (Entered: 12/01/2016)
12/08/2016	33	REPLY to Response to Motion re 29 Emergency MOTION to Alter Judgment *Pursuant to Fed. R. Civ. P. 59(e)* filed by James G. Paulsen. (Attachments: # 1 Certificate of Service) (Francisco-FitzMaurice, Brady) (Entered: 12/08/2016)
12/13/2016	34	MEMORANDUM DECISION AND ORDER dated 12/13/16 denying NLRB's 29 Motion. (Ordered by Judge Brian M. Cogan on 12/13/2016.) (Guzzi, Roseann) (Entered: 12/13/2016)
12/14/2016	35	RESPONSE in Opposition re 31 MOTION to Stay re 7 Order to Show Cause, *and/or Suspend Injunction Pending Appeal* filed by James G. Paulsen. (Attachments: # 1 Certificate of Service) (Francisco-FitzMaurice, Brady) (Entered: 12/14/2016)
12/29/2016	36	MEMORANDUM DECISION AND ORDER dated 12/29/16 denying PrimeFlight's 31 Motion for a stay of the Preliminary Injunction. (Ordered by Judge Brian M. Cogan on 12/29/2016) (Guzzi, Roseann) (Entered: 12/29/2016)
01/01/2017		Civil Case Terminated, as 24 constitutes a dispositive Order. Ordered by Judge Brian M. Cogan on 1/1/2017. (Cogan, Brian) (Entered: 01/01/2017)
01/03/2017	37	NOTICE OF CROSS APPEAL as to 25 Preliminary Injunction, 24 Order on Motion for Preliminary Injunction, by Attorney for James G. Paulsen. Appeal Record due by 1/17/2017. No fee paid. Service done electronically. (Francisco-FitzMaurice, Brady) Modified on 1/3/2017 to reflect fee status and service. (McGee, Mary Ann). (Entered: 01/03/2017)
01/03/2017		APPEAL FILING FEE DUE re 37 Notice of Cross Appeal, Please either come to the clerks office or mail the filing fee in the amount of $505.00. (McGee, Mary Ann) (Entered: 01/03/2017)
01/03/2017		First Supplemental Electronic Index to Record on Appeal sent to US Court of Appeals. 37 Notice of Cross Appeal. (McGee, Mary Ann) (Entered: 01/03/2017)

PACER Service Center

Transaction Receipt

01/12/2017 16:24:42

PACER Login:	NLRB2014:2607217:0	**Client Code:**	PrimeFlight
Description:	Docket Report	**Search Criteria:**	1:16-cv-05338-BMC
Billable Pages:	4	**Cost:**	0.40

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**MEMORANDUM DECISION AND ORDER**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

Before the Court is a petition for a preliminary injunction under § 10(j) of the National Labor Relations Act ("NLRA") filed by James G. Paulsen, the Regional Director of Region 29 of the National Labor Relations Board (the "NLRB" or the "Board"). The petition seeks relief pending the determination by an Administrative Law Judge over proceedings currently underway, in which petitioner claims that respondent PrimeFlight Aviation Services, Inc. ("PrimeFlight") has engaged and is engaging in unfair labor practices within the meaning of §§ 8(a)(1) and (5) of the NLRA. See 29 U.S.C. § 158(a)(1), (5). Petitioner seeks an injunction restraining respondent from further violations of the NLRA; directing respondent to recognize and bargain with the Service Employees International Union, Local 32BJ (the "Union" or "SEIU"), as required under § 8(a)(5); and requiring respondent to provide information relevant to the Union's collective bargaining efforts.

The Court ordered respondent to show cause why it should not grant the relief requested. Having heard oral argument on the petition and reviewed the parties' submissions, the Court

concludes that petitioner has established reasonable cause for the Court to believe that PrimeFlight has committed unfair labor practices and that injunctive relief is just and proper. The petition is therefore granted in part.

BACKGROUND

JetBlue Airways Corporation ("JetBlue") operates out of Terminal Five at John F. Kennedy Airport ("JFK") in Queens, New York. As part of its operations, JetBlue, through independent contractors, offers baggage handling, skycap, checkpoint, and wheelchair services to its customers. Prior to May 9, 2016, Air Serv, an independent contractor, performed the baggage handling, skycap, and checkpoint services for JetBlue, and PAX Assist, another independent contractor, performed the wheelchair services for JetBlue. During this period, SEIU represented Air Serv employees in collective bargaining pursuant to a March 2015 recognition agreement, whereas PAX Assist employees had no union affiliation.

Respondent PrimeFlight is an independent contractor that provides terminal services at several airports around the country. In early 2016, PrimeFlight successfully bid on a contract to provide JetBlue's terminal services at Terminal Five at JFK. PrimeFlight entered into a contract with JetBlue, under which PrimeFlight was to provide baggage handling, skycap, checkpoint, and wheelchair services. On May 9, 2016, PrimeFlight took over these services from both Air Serv and PAX Assist in Terminal Five and continues to provide all four types of terminal services to date.

In the weeks leading up to the May 9, 2016 transition date, PrimeFlight hired its workforce. To hire its workforce and ensure no gap in services between Air Serv and PAX Assist ceasing operations on May 8 and PrimeFlight beginning operation on May 9, PrimeFlight asked Air Serv to provide PrimeFlight with its lists of active Air Serv employees. PrimeFlight,

concerned with ensuring that it had enough qualified employees – *i.e.*, employees with the credentials required to pass through airport security – asked Air Serv to encourage its employees to apply for positions with PrimeFlight.

When PrimeFlight began operations on May 9, 2016, it had hired 362 employees in total. More than half of those employees were former Air Serv employees (189 of 362, or 52%). Further, on May 9, 2016, PrimeFlight had employees in all four job classifications – baggage handling: 76 employees; skycap: 35 employees; checkpoint: 64 employees; and wheelchair: 174 employees. By July 2016, PrimeFlight would ultimately employ 507 individuals in all four classifications – baggage handling: 81 employees; skycap: 35 employees; checkpoint: 67 employees; and wheelchair: 309 employees. Comparing the numbers of employees initially hired against the ultimate employment rolls, on May 9, 2016, PrimeFlight had hired at least fifty percent of the employees that it would ultimately employ in all four job classifications – baggage handling: 76 of 81, or 94%; skycap: 35 of 35, or 100%; checkpoint: 64 of 67, or 95%; and wheelchair: 174 of 309, or 56%. Overall, as of May 9, 2016, PrimeFlight had hired more than half of the employees that it would ultimately employ – 362 of 507, or 71%.

On May 23, 2016, SEIU sent a letter to PrimeFlight, demanding that PrimeFlight recognize SEIU as the representative of "PrimeFlight's employees at JFK Airport, the majority of whom were formerly Air Serv employees represented by Local 32BJ." The letter continued that "these are employees working at Terminal Five on the Jet Blue account" and are "providing baggage handling, skycap and check point services;" SEIU's letter stated that it understood that "the appropriate bargaining unit also includes employees providing wheelchair assistance." SEIU requested "recognition for a unit of all full-time and regular part-time employees at Terminal Five on the Jet Blue account, excluding supervisors, office clericals, and guards as

defined in the NLRA."[1] In addition, SEIU requested certain information from PrimeFlight, including a roster of all bargaining unit employees, applicable employee handbooks, and plan descriptions for health insurance and employee benefits.

On May 25, 2016, PrimeFlight replied to SEIU, requesting evidence that established the basis for SEIU's claim that it represented the employees at issue, including Board certifications and collective bargaining agreements. On June 2, 2016, SEIU replied to PrimeFlight, enclosing a copy of its March 2015 recognition agreement with Air Serv. PrimeFlight replied again on June 10, 2016, seeking any additional agreements between the parties or any collective bargaining agreements for any of its employees. On June 15, 2016, the Union replied to PrimeFlight, stating that it had already provided sufficient information and that it would provide additional material once PrimeFlight recognized the Union. There was no further correspondence between the Union and PrimeFlight after this letter.

On May 26, 2016, three days after SEIU's May 23, 2016 request for recognition, PrimeFlight began to hire additional employees. PrimeFlight completed all of its hiring on July 6, 2016, having hired 507 employees in total. As a result of this hiring, former Air Serv employees comprised 39.4% of the total hired. In its submissions to the Court, PrimeFlight stated that on taking over on May 9, 2016, it determined that it needed 500 employees and that it intended to hire more employees in two phases: one in mid-to-late June and one in July.

In July, the NLRB filed an administrative complaint under the NLRA against PrimeFlight, and the administrative hearing related to that charge is currently underway.

[1] The letter also described a second unit, PrimeFlight's employees at Terminal A at Newark Airport that were providing baggage handling, skycap, and checkpoint services for JetBlue, but this unit is not at issue here.

DISCUSSION

Section 10(j) of the NLRA provides that the NLRB may petition the local district court "for appropriate temporary relief or restraining order" pending the Board's final adjudication of a charge of unfair labor practices. 29 U.S.C. § 160(j). Correspondingly, § 10(j) provides that a district court "shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." Id. In the Second Circuit, a two-pronged test is used to determine whether to grant an injunction under § 10(j): "First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper." Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd., 247 F.3d 360, 364-65 (2d Cir. 2001).

When factual or legal disputes arise in a § 10(j) proceeding, courts within the Second Circuit are required to give substantial deference to the position of the Regional Director. Courts have often held that § 10(j) relief should be denied only if the court is "'convinced that the NLRB's legal or factual theories are fatally flawed.'" Mattina ex rel. NLRB v. Kingsbridge Heights Rehab. & Care Ctr., 329 F. App'x 319, 321 (2d Cir. 2009) (quoting Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1059 (2d Cir. 1995)). With respect to issues of fact, the Regional Director should be "given the benefit of the doubt" and all factual inferences should be drawn in his favor if the inference is "within the range of rationality." Hoffman, 247 F.3d at 365 (internal quotation marks omitted). Disputes over issues of law are also viewed in the Regional Director's favor: "[O]n questions of law, the Board's view should be sustained unless the court is convinced that it is wrong." Id. (internal quotation marks omitted).

In the instant matter, respondent disputes the NLRA's application to the present dispute and thus both the NLRB's and this Court's jurisdiction under § 10(j); accordingly, before the Court can reach the analysis for a preliminary injunction under § 10(j), the Court must first determine whether jurisdiction is proper under the NLRA.

I. The NLRB Has Jurisdiction over PrimeFlight's Employees at Terminal Five at JFK.

The NLRA's protections extend to workers who qualify as "employee[s]" under § 2(3) of the Act. 29 U.S.C. § 152(3). However, the term "employee," as defined in the NLRA, does not include "any individual employed by an employer subject to the Railway Labor Act." Instead, the Railway Labor Act ("RLA") gives the National Mediation Board ("NMB") jurisdiction over a company and its employees when either that company is a common carrier by air or rail as defined in the RLA, or that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce, referred to as a "derivative carrier" in RLA and NMB parlance. 45 U.S.C. §§ 151, *et seq.*; see, e.g., Airway Cleaners, LLC, 41 NMB 262, 267 (2014). When the company is not directly a carrier, the NMB applies a two-part jurisdictional test to determine whether the company is subject to the RLA as a "derivative carrier." The test asks (1) whether the functions performed by the potential derivative carrier's employees are among those traditionally performed by carrier employees, and (2) whether the potential derivative carrier's labor relations are subject to significant control by the carrier. Cunningham v. Electronic Data Sys., Inc., 579 F. Supp. 2d 538, 541 (S.D.N.Y. 2008); Union of Indus. v. Nat'l Mediation Bd., 139 F. Supp. 2d 557, 561 (S.D.N.Y. 2001).

The NLRB has jurisdiction over the instant dispute for several reasons. First, the NLRB's decision to assert jurisdiction over this case is subject to deference. In so concluding, the Court confronts respondent's position at oral argument that the NLRB is not entitled to Chevron deference on matters related to its jurisdiction. This position is wrong. In City of

Arlington, Tex. v. F.C.C., 133 S. Ct. 1863 (2013), the Supreme Court unequivocally rejected an argument that sought to delineate some fictional boundary between deference to jurisdictional questions and deference to nonjurisdictional questions: "[Q]uestions about the scope of agencies' regulatory jurisdiction . . . are all questions to which the Chevron framework applies." 133 S. Ct. at 1870; see also id. at 1868 ("[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority."). The Supreme Court has even rejected this attempt to bifurcate questions of deference in cases involving the NLRB. NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 830, 104 S. Ct. 1505, 1510 (1984) ("[W]e have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here," *i.e.*, "a jurisdictional or legal question concerning the coverage of the [NLRA]."). Here, the NLRB has asserted jurisdiction on the basis that the PrimeFlight employees are not excluded from the NLRA's coverage by operation of the RLA. This determination is supported by both NLRB and NMB precedents, to which the Court also affords deference given that they each reach questions of the agency's jurisdictional coverage. Accordingly, the Court gives deference to the NLRB's position asserting jurisdiction in the instant matter.

Second, it is significant, and subject to deference, that the NMB has, in response to referrals from the NLRB, declined jurisdiction over cases presenting similar factual situations involving airline contractors that provide similar ancillary services. For example, in Menzies Aviation, Inc., 42 NMB 1 (2014), the NLRB referred to the NMB the question of whether Menzies Aviation, Inc., an independent contractor that provides ramp, baggage, and airport

servicing functions to Alaska Airlines, British Airways, and Virgin America, was subject to the RLA. The NMB declined RLA jurisdiction over Menzies, instead finding that although Menzies performed the kind of work typically done by air carriers, the air carriers did not directly or indirectly control Menzies. 42 NMB at 7. See also Airway Cleaners, LLC, 41 NMB 262, 267-69 (2014) (NMB declining jurisdiction over contractor providing cleaning and maintenance to airlines); Bags, Inc., 40 NMB 165, 169 (2013) (NMB declining jurisdiction over contractor providing skycap, wheelchair, and unaccompanied minor services to airlines).

It appears to the Court, as it appeared to the NLRB, that the NMB has, since 2013, ceded jurisdiction over certain airline contractors to the NLRB. See PrimeFlight Aviation Servs., Inc., Case 12-RC-113687, 2015 WL 3814049, *1 n.1 (NLRB June 18, 2015) ("[T]hese cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds, and that this view is currently extant NMB law."). The NLRB need not continue seeking advisory guidance from the NMB over airline contractors when the NMB has expressed a clear position that it does not have jurisdiction over certain categories of contractors employed by air carriers. Further, it is reasonable that the NLRB "will not refer a case [to the NMB] that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction." Spartan Aviation Indus., Inc., 337 NLRB 708 (2002). It is additionally reasonable that the NLRB now affirmatively asserts jurisdiction in these cases, absent evidence that an airline exercises greater control over the contractor than is present in "a typical subcontractor relationship." Allied Aviation Serv. Co., 362 NLRB No. 173, 2015 WL 4984885, *2 (Aug. 19, 2015).

Second, even if the Court were to apply the NMB's two-part test to the present facts, it would nonetheless determine that PrimeFlight is not a derivative carrier and that the NLRB has

jurisdiction. As stated above, the NMB's test asks two questions that both must be answered affirmatively: (1) are the PrimeFlight employees' functions traditionally performed by carrier employees (the "functions factor"); and (2) does JetBlue exercise substantial control over PrimeFlight (the "substantial control factor")? Here, while the answer to the first question is certainly yes, the answer to the second question is resoundingly no.

The Court declines to adopt PrimeFlight's focus on the functions factor to the detriment of the substantial control factor. Although the Court recognizes PrimeFlight's argument that a work stoppage by its employees would halt JetBlue's services, that fact is true of all of the cases in which the NMB declined jurisdiction. In Menzies, Bags, and Airway Cleaners, the NMB found that the services were all typically performed by an air carrier, but it was the substantial control factor that required the NMB to decline jurisdiction.

The substantial control factor turns on whether the airline carrier controls, directly or indirectly, the employer and its employees. Factors routinely considered in this analysis are (i) the control over the manner in which the entity conducts its business, including access to the employer's operations and records; (ii) involvement in hiring, firing, and disciplinary decisions; (iii) supervision and direction of the entity's employees in the performance of their job duties; (iv) influence over the conditions of employment; (v) influence over employee training; and (vi) control over uniform and appearance requirements. See, e.g., Auto. Distr. of Buffalo Inc. & Complete Auto Network, 37 NMB 372, 378 (2010). Not all of the factors must be present to meet the substantial control test, and importantly, it is not a matter of simply asking whether there is influence or involvement – the question turns on the materiality of that influence and involvement.

PrimeFlight unpersuasively argues that, pursuant to their agreement with JetBlue, JetBlue exercises substantial control over nearly every aspect of its JFK operations because all indicia of control are present. However, as stated above, the mere presence of these factors is insufficient, and the overwhelming factual similarities between the instant case and Bags, Inc., where the NMB declined jurisdiction, is instructive in finding the factors insufficiently met.

First, PrimeFlight argues that its employees use JetBlue space in Terminal Five; yet in Bags, the company either leased space or was given space by the airlines it served, and the NMB found this factor materially insufficient. Bags, Inc., 40 NMB at 167. Next, PrimeFlight argues that it builds its employees' work schedules and hours based on the flight schedule JetBlue provides, but similarly, the air carriers' schedules dictated the staffing levels and shift assignments of Bags employees, and the NMB found that insufficient to confer jurisdiction. Id. at 168. Next, PrimeFlight argues that JetBlue tracks the work PrimeFlight performs on a real-time basis to ensure appropriate staffing levels; however, similarly, Bags and Delta had daily conference calls to discuss staffing, and this was insufficient for NMB jurisdiction. Id. at 167. PrimeFlight also argues that JetBlue's Statement of Work imposes rules of conduct to which PrimeFlight employees must adhere, but in Bags, there were also agreements with the carriers that dictated certain standards, including professionalism, competence, and language skills. Id. at 166. Next, PrimeFlight argues that JetBlue has the right to inspect and audit PrimeFlight's books, records, and manuals at all times, as well as to request training records, accident and injury reports, employee grievances, and disciplinary actions; however, similarly and seemingly more controlling, Bags submitted weekly reports to the airline on all issues and accounting, and the carriers had full access to review employee and training records. Id. at 167, 168.

With respect to hiring, discipline, and termination, PrimeFlight argues that JetBlue has the right to demand the removal of an employee from the workplace, and if JetBlue exercises that right, PrimeFlight must terminate that employee. However, PrimeFlight provided the Court with its agreement with JetBlue, and nowhere is there a provision providing JetBlue with such a unilateral right of removal. Petitioner pointed to one provision during oral argument that calls for removal in a very narrow circumstance: if a skycaps employee is found to be collecting revenue outside of the system, JetBlue will request that employee be removed from baggage checking services. However, there is no indication in the agreement that the employee must be terminated; rather, it appears that PrimeFlight can simply transfer the employee to checkpoint or wheelchair services, as the agreement only calls for removal from baggage checking.

The Court found another provision that calls for PrimeFlight to discipline employees, up to and including termination, if the employee causes work stoppages or interferes with JetBlue's ability to provide its services, but even there, the Court notes that the ultimate disciplinary decision is left in the hands of PrimeFlight. With respect to hiring, PrimeFlight has control over personnel decisions: it set up its own hiring process, interviewed employees, and made employment offers without input from JetBlue. Further, PrimeFlight set the rate of pay, benefits, disciplinary procedures, and attendance requirements, among other policies.

Next, PrimeFlight argues that JetBlue supervisors interact with PrimeFlight employees every day and have the authority to direct work; however, similarly, Bags had daily conference calls with Delta managers to discuss wheelchair complaints and any other daily issues, including inadequate staffing, and Bags was to use "best efforts to follow any instructions provided by Delta's designated management representatives . . . regarding the standards, procedures, and practices to be followed." Id. at 167.

PrimeFlight argues that JetBlue provides PrimeFlight employees with radios, wheelchairs, computers, baggage carts, and the technology platforms used by PrimeFlight to provide services, in addition to the locker rooms and breakrooms; yet, in Bags, although Bags owned the baggage carts, wheelchair dispatch handhelds, and the computers for Alaska skycap, Delta provided its curbside skycap computers, bag tag printers, curb podiums, some of the wheelchairs, and the breakroom, and Alaska Airlines provided the curbside check-in podium, curbside space, bag belt, wheelchairs, electric carts for terminals, and breakroom. Id. at 167. There is no significant difference between providing a substantial amount of equipment and all of the equipment such that the jurisdictional question would come out differently.

Next, PrimeFlight argues that it trains its employees initially and recurrently, and that the training includes certain JetBlue curriculum, like policies and initial training. PrimeFlight further provides that its employees are to attend JetBlue meetings relating to safety, new programs, special events, and coordination. But this is also similar to Bags: Bags provided disability and customer service training for all employees, with the air carriers training one Bags employee to train the other Bags employees on certain check-in procedures. Further, in Bags, the air carriers provided all additional training that was required by the FAA. Id. at 166-67.

Finally, PrimeFlight argues that it had to receive approval from JetBlue's branding department regarding PrimeFlight's uniform, and that if PrimeFlight seeks to change the uniform, it needs to get approval from JetBlue. However, in Bags, the airlines and Bags stipulated personal appearance standards and the airlines had to approve the uniforms, as well. Id. at 167, 169. Furthermore, in both cases, PrimeFlight and Bags employees were not held out as carrier employees; their uniforms clearly identified them as PrimeFlight and Bags, respectively.

In each of the factual situations in Bags, the NMB found that the presence of the factors was "insufficient to establish jurisdictional control without additional evidence of material control by a carrier." Id. at 170 (emphasis added). It is this material control that the Court finds lacking here, as well. PrimeFlight may claim that JetBlue has provided work specifications, but these specifications are not sufficient to create RLA jurisdiction. Airway Cleaners, 41 NMB at 268; Bags, Inc., 40 NMB 165, 166-67 (2013). Accordingly, the Court finds that the NLRA properly controls.

II. The NLRB Is Entitled to a Preliminary Injunction Against PrimeFlight.

Having found that the NLRA controls, the Court can now determine whether a preliminary injunction is warranted. As stated above, in this Circuit, a two-pronged test is used to determine whether to grant an injunction under § 10(j): "First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper." Hoffman, 247 F.3d at 364-65.

A. There Is Reasonable Cause to Believe that PrimeFlight Has Committed Unfair Labor Practices.

The Second Circuit has stressed that a district court may find "reasonable cause" under the first prong of the § 10(j) standard without making a final determination whether the conduct in question constitutes an unfair labor practice. Silverman, 67 F.3d at 1059. In fact, the threshold for finding "reasonable cause" has been analogized to the threshold for making out a *prima facie* case, and courts have held that the Regional Director need only "come forward with evidence 'sufficient to spell out a likelihood of violation.'" Blyer v. Pratt Towers, Inc., 124 F. Supp. 2d 136, 143 (E.D.N.Y. 2000) (quoting Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union, 494 F.2d 1230, 1243 (2d Cir. 1974)).

In the instant case, the issue of whether there is reasonable cause to believe that an unfair labor practice occurred hinges on determining whether PrimeFlight is a Burns successor and was therefore obligated to recognize and bargain with the Union in good faith as of the date of the demand letter. For the reasons set forth below, the Court finds it likely that PrimeFlight was a Burns successor on May 23, 2016, and that its conduct amounted to unfair labor practices.

The Supreme Court held in NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 92 S. Ct. 1571 (1972), that if a new employer "voluntarily [takes] over a bargaining unit" of its predecessor, then the successor employer is under a duty to bargain with the union that represented the predecessor's employees. Burns, 406 U.S. at 287, 92 S. Ct. at 1582.[2] Under Burns, the obligation to recognize and bargain with an incumbent union exists when there is (i) "substantial continuity" between the predecessor and successor enterprises, and (ii) when a majority of the employees of the successor, in an appropriate unit, had been formerly employed by the predecessor. Burns, 406 U.S. at 280-81, 92 S. Ct. at 1578-79. In a later case, the Court further explained that determining whether a new company is a successor "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43, 107 S. Ct. 2225, 2236 (1987).

The Supreme Court has made it clear that Burns successorship is based on an employer's voluntary choice to hire more than fifty percent of its workforce from its predecessor's workforce. See Fall River, 482 U.S. at 41, 107 S. Ct. at 2234-35 (explaining that the

[2] The Court inquired particularly on the topic of PrimeFlight's decision to "voluntarily [take] over [the] bargaining unit" of Air Serv during oral arguments. PrimeFlight claimed that it did not have any knowledge that Air Serv employees were unionized when it made its bid. Accepting PrimeFlight's argument that the bid process did not require the same kind of due diligence as a merger, the Court still has a hard time understanding how PrimeFlight failed to make at least a first-level inquiry as to the employees' bargaining status – maybe not at the bid stage because it was not clear then that PrimeFlight intended to hire Air Serv employees, but certainly in April when PrimeFlight communicated with Air Serv about encouraging its employees to apply to PrimeFlight. Surely then, PrimeFlight could have asked whether Air Serv employees were unionized. Moreover, if PrimeFlight failed to ask that question, then it is even harder to say that PrimeFlight, as a successor, did not "voluntarily [take] over" a unionized workforce when it paid no attention to whether the employees it was hiring were unionized.

successorship doctrine is based on the "conscious decision" of the new employer "to maintain generally the same business and to hire a majority of its employees from the predecessor" and that "[t]his makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor"). PrimeFlight is likely a Burns successor because the record indicates that (i) PrimeFlight substantially continued Air Serv's operations in Terminal Five, and (ii) as of May 23, 2016, a majority of the employees that PrimeFlight hired were former employees of Air Serv.

(i) Substantial Continuity

The evidence tends to show that there is substantial continuity between Air Serv and PrimeFlight. The "substantial continuity" inquiry involves assessing several factors:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River, 482 U.S. at 43, 107 S. Ct. at 2236. The test focuses on the retained employees' perspective as to whether their jobs are essentially unaltered. Id. PrimeFlight continued to operate Air Serv's operations in baggage handling, skycap, and checkpoint services in basically unchanged form. The transition between the two enterprises was overnight, with Air Serv concluding its operations on May 8 and PrimeFlight beginning its operations without interruption on May 9. Further, on May 9, the PrimeFlight employees in baggage handling, skycap, and checkpoint services were over 90% the same as those previously employed in those classifications at Air Serv.

Petitioner provided affidavits indicating that, from the employees' perspectives, there was no material difference between their last day at Air Serv and their first day at PrimeFlight, May 8 and May 9, respectively. Baggage handler Denzyl Prince worked on both Air Serv's last day and

PrimeFlight's first day, and he stated that there was no interruption in services between the two companies. Similarly, checkpoint services employee Allison Halley stated that her job remained substantially the same after PrimeFlight took over: She kept the same supervisor, the same shift, and the same duties. Halley further stated that the only difference for her was appearance: She wears a different uniform, her identification says "PrimeFlight" instead of "Air Serv," and she uses a different kind of time clock to log her hours.

PrimeFlight's changes, such as rebranding uniforms and IDs, are minor, considering that the employees are doing the same work they were doing for Air Serv, in the same location, with substantially the same supervision, and with no interruption in service. Although PrimeFlight added another classification, wheelchair assistance, from PAX Assist, that does not alter the analysis: the focus is on the unionized employees' perceptions of their jobs. See, e.g., NLRB v. DeBartelo, 241 F.3d 207, 210-11 (2d Cir. 2001) (holding that substantial continuity "is evaluated principally from the employees' perspective, the crucial question being whether those employees who have been retained will understandably view their job situations as essentially unaltered" (internal quotation marks omitted)).

(ii) Majority Status

Once the substantial continuity test is satisfied, a successor's bargaining obligation requires that a majority of the employees of the successor, in an appropriate unit, were formerly employed by the predecessor. Here, the record shows that as of May 23, 2016, when SEIU made its demand for recognition, 52% of PrimeFlight's employees (189 of 362) had been previously employed by Air Serv and represented by SEIU.

PrimeFlight's response is that on May 23, it had not yet finished hiring, making the NLRB's and the Union's analysis of the composition of its workforce premature. Relying on Fall River, PrimeFlight argues that its bargaining obligation is triggered only if a "substantial and

representative complement" existed at that time. Fall River, 482 U.S. at 47, 107 S. Ct. at 2238. However, the facts underlying the decision in Fall River do not help PrimeFlight. As an initial matter, the Court notes that Fall River dealt with an entirely different situation; there, the Supreme Court confronted a seven-month gap between the end of the predecessor's business and the commencement of the successor's business. In setting the issue for resolution, the Court determined that in Burns, the Court "did not have to consider the question when the successor's obligation to bargain arose: [the predecessor's] contract expired on June 30 and [the successor] began its services with a majority of former [predecessor] guards on July 1." Id. at 47, 107 S. Ct. at 2238. That is the situation we have here, which suggests, in line with Burns, that the obligation to bargain arose on May 9, 2016, but was officially triggered when SEIU requested recognition on May 23.

Even if this Court were to apply the "substantial and representative complement" test found in Fall River, the analysis would still favor the NLRB. Where "there is a start-up period by the new employer while it gradually builds its operations and hires employees," the NLRB and courts have "adopted the 'substantial and representative complement' rule for fixing the moment when the determination as to the composition of the successor's work force is to be made." Id. at 47, 107 S. Ct. at 2238. When fixing that moment, the NLRB examines the following factors: whether the employer has substantially filled the unit job classifications designated for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the expected expansion. Id. at 49, 107 S. Ct. at 2239.

The rule's application turns on the facts of the case. In Fall River, the Court found Fall River to be a Burns successor because the successor "had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement." Id. at 52, 107 S. Ct. at 2240. Here, on the demand date, PrimeFlight hired people into all four job classifications; it had hired at least 50% in a majority of the classifications, in fact hiring over 90% of the employees in three out of the four job classifications and 56% in the fourth classification; and it employed a majority of the employees it would eventually employ when it reached full complement, 71%, or 362 out of 507 employees.

PrimeFlight's argument that it had not come close to realizing its business goal of increasing its employee complement to at least 500 workers is not persuasive given the lack of support in the record and the standard that this Court draw all factual inferences in favor of the NLRB. PrimeFlight provided an affidavit from its Division Vice President Matthew Barry, stating that on beginning operations, PrimeFlight made the decision to increase hiring to 500. The NLRB disputes this point, arguing that PrimeFlight began to hire in earnest a short three days after receiving the demand letter to avoid its bargaining obligation. The NLRB further presents that as part of the administrative investigation, PrimeFlight produced documentary evidence originating prior to the demand letter and showing discussions about hiring as many as 50 employees in addition to the 362 employees it had already hired. Even if there was no dispute and the Court were to accept PrimeFlight's argument that it intended to hire more workers, this still would only trigger the "substantial and representative complement" analysis, and that analysis still favors the NLRB.

PrimeFlight next argues that July 6, 2016, is the appropriate date to assess collective bargaining obligations because that is when PrimeFlight met its staffing goals. This argument is inherently flawed. PrimeFlight is essentially asking this Court to supplant the "substantial and representative complement" rule with a *per se* "full complement" rule. The Court declines this invitation.

Once majority status is found, a successor's bargaining obligation requires that the unit remain appropriate for collective bargaining under the successor's operations. The NLRB has long held that a single-facility unit is presumptively appropriate and that the party opposing it has a heavy burden to rebut its presumptive appropriateness. See, e.g., NLRB v. HeartShare Human Servs. of N.Y., Inc., 108 F.3d 467, 471 (2d Cir. 1997). Here, the unit is presumptively appropriate because it is a single-facility, wall-to-wall unit of PrimeFlight's employees at Terminal Five at JFK. Although the unit includes the wheelchair assistants, who were unrepresented at the time that PrimeFlight took over operations, this does not destroy PrimeFlight's bargaining obligation. In analyzing a successor's duty to bargain, the NLRB has found units that include previously unrepresented employees to be appropriate, as long as a majority of the unit is comprised of predecessor employees. Good N' Fresh Foods, 287 NLRB 1231, 1236-37 (1988) (finding that successor was obligated to bargain with union as unit comprised of formerly unrepresented maintenance employees and represented production employees); see also NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 871 (2d Cir. 1981) (holding that the NLRB's bargaining unit determinations are rarely to be disturbed unless arbitrary, unreasonable, or not supported by substantial evidence.).[3]

[3] Courts reviewing the NLRB's determinations regarding appropriate units base their analysis on "whether the . . . employees have a sufficient community of interest to be an appropriate unit." Trustees of Masonic Hall & Asylum Fund v. NLRB, 699 F.2d 626, 632 (2d Cir. 1983). A substantial community of interest may be found for units of varying scope, and the NLRB enjoys discretion to select from those possible arrangements in reaching its

A successor employer who satisfies the Burns test but fails to meet its bargaining obligation violates § 8(a)(5) of the Act. Burns, 406 U.S. at 281, 92 S. Ct. at 1579. Those successors who refuse to bargain under their § 8(a)(5) obligation are in violation of both §§ 8(a)(5) and 8(a)(1) of the NLRA. For the foregoing reasons, the Court has reasonable cause to find that PrimeFlight was likely a successor business to Air Serv; that, on the date of the Union's demand letter, previously represented parties were the majority of employees; that the majority was a substantial and representative complement of the full staff reached on July 6, 2016; that PrimeFlight had a duty to bargain with the union; and that its failure to do so likely constituted a violation of the NLRA.

B. Granting Injunctive Relief Against PrimeFlight Would Be Just and Proper.

An injunction is deemed to be "just and proper" when it is "'necessary to prevent irreparable harm or to preserve the status quo.'" Mattina, 329 F. App'x at 321 (quoting Hoffman, 247 F.3d at 368). Although this standard is meant to "preserve[] traditional equitable principles governing injunctive relief," a court should be mindful to apply this standard "in the context of federal labor laws." Hoffman, 247 F.3d at 368. This means that "irreparable harm" should be interpreted with regard to "the policies of the [NLRA]," and actions which undermine these policies can constitute irreparable harm. Id. (quoting Seeler v. Trading Port, Inc., 517 F.2d 33, 40 (2d Cir. 1975)).

In applying these principles, the Second Circuit has concluded that § 10(j) relief is warranted where serious and pervasive unfair labor practices threaten to render the Board's processes "totally ineffective" by precluding a meaningful final remedy, or where interim relief

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unit determination. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 610, 111 S. Ct. 1539, 1542 (1991). Neither party raises this analysis; however, based on the community-of-interest factors, the evidence submitted, and petitioner's statements at oral argument that employees were shifted through job classifications, there is reasonable cause to find the unit appropriate, and there is no reason to disturb the NLRB's determination. See, e.g., Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450, 454 (2d Cir. 1994).

is the only effective means to preserve or restore the status quo as it existed before the onset of the violations; or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint. Kaynard v. Mego Corp., 633 F.2d 1026, 1033-34 (2d Cir. 1980).

Based on the affidavits and briefing provided by the parties, a preliminary injunction is just and proper. There is evidence that there has been a chilling effect on speaking to Union representatives, attending meetings, and voicing support in any meaningful way. PrimeFlight's employees have given sworn affidavits showing that support for SEIU has declined since PrimeFlight began operations.

Because the Court has found reasonable cause to believe that an unfair labor practice occurred and that granting the injunctive relief would be just and proper, the Court will grant the preliminary injunction in part. However, the Court has modified the terms of the preliminary injunction that petitioner has requested so as to prevent respondent from suffering certain unnecessary costs or obligations pending the final determination of the Administrative Law Judge.

D. Terms of the Injunction

For the reasons stated above, a preliminary injunction shall issue. The proposed preliminary injunction language that petitioner submitted to the Court is too broad as it would essentially award petitioner complete and permanent relief to which petitioner is not entitled. The Administrative Law Judge is conducting proceedings and will make his findings of fact and determinations for permanent relief. To ensure that the relief awarded is temporary and contingent on the outcome of the administrative proceeding and to protect PrimeFlight from unduly burdensome obligations and costs, the terms of the injunction will be as follows. First,

PrimeFlight must recognize the Union as the interim collective bargaining representative of PrimeFlight's full-time and part-time JFK employees, excluding confidential employees, office clericals, guards, and supervisors, as defined by the NLRA.

Next, PrimeFlight must engage in good faith collective bargaining with the Union; however, the bargaining is subject to the following limitations: (i) any agreement reached between PrimeFlight and the Union may not include any provisions regarding a minimum number of shifts per employee or minimum staffing levels per shift – PrimeFlight will determine the shifts and staffing levels when JetBlue provides notice of its staffing and shift needs, and PrimeFlight will not be forced to needlessly staff and pay employees when there is no need to staff them; and (ii) any agreement reached between PrimeFlight and the Union is subject to termination if the Administrative Law Judge determines that PrimeFlight is not subject to the NLRA or did not violate any provisions in the NLRA. These restrictions will enable the parties to bargain in good faith to facilitate the Union being able to represent PrimeFlight employees in negotiations without sacrificing PrimeFlight's flexibility to assign appropriate coverage to meet JetBlue's service needs.

Finally, PrimeFlight will also provide SEIU with the information requested in its May 23, 2016 letter, including a roster of all bargaining unit employees, applicable employee handbooks, and information pertaining to health insurance and employee benefit plans.

CONCLUSION

The petition for a preliminary injunction is granted in part. The terms of the preliminary injunction as set forth above will be issued separately.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
October 24, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**PRELIMINARY INJUNCTION**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

This matter having come before the Court on the petition of James G. Paulsen is a Regional Director of the National Labor Relations Board ("NLRB") for injunctive relief pending administrative review of an unfair labor practices charge against PrimeFlight Aviation Services, Inc. ("PrimeFlight"), and this Court having rendered its October 24, 2016 Memorandum Decision and Order, granting in part the petition for injunctive relief, it is hereby

ORDERED, ADJUDGED AND DECREED, that PrimeFlight, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, are hereby enjoined, pending the final disposition of the matters involved herein by the NLRB, as follows:

1. PrimeFlight shall immediately recognize the Service Employees International Union, Local 32BJ (the "Union") as the interim collective-bargaining representative of its employees in the following bargaining unit: all full-time and regular part-time employees employed by PrimeFlight at Terminal Five at JFK Airport, excluding

confidential employees, office clericals, guards, and supervisors, as defined by the National Labor Relations Act ("NLRA");

2. PrimeFlight shall immediately commence bargaining in good faith with the Union, subject to the following conditions:
    a. Any agreement reached between PrimeFlight and the Union is subject to termination if the NLRB determines that PrimeFlight is not subject to the NLRA or did not violate any provisions therein;
    b. Any agreement reached between PrimeFlight and the Union may not include minimum shift or employee requirements so that PrimeFlight is able to assign shifts and employees commensurate with JetBlue's expressed employment needs;
3. PrimeFlight shall, within 10 days of the date of this Preliminary Injunction, provide the Union with the information requested in its May 23, 2016 letter, including a roster of all bargaining unit employees, applicable employee handbooks, and information pertaining to health insurance or other employee benefit plans;
4. PrimeFlight shall, within 10 days of the date of this Preliminary Injunction, post copies of this Preliminary Injunction at all locations where employer notices to employees are customarily posted; maintain such notices free from all obstructions or defacements pending the outcome of the administrative proceeding before the NLRB; and grant to agents of the NLRB reasonable access to PrimeFlight's areas at JFK Airport to monitor compliance with this posting requirement; and
5. PrimeFlight shall, within 20 days of the date of this Preliminary Injunction, file with this Court and serve a copy on petitioner, a sworn affidavit from a responsible official

at PrimeFlight that describes with specificity how PrimeFlight has complied with the terms of this Preliminary Injunction, including the exact locations where PrimeFlight has posted the materials required under this Preliminary Injunction.

SO ORDERED.

Digitally signed by
Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
October 24, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	:	**MEMORANDUM DECISION AND ORDER**
Petitioner,	:	16 Civ. 5338 (BMC)
-against-	:	
PRIMEFLIGHT AVIATION SERVICES, INC.,	:	
Respondent.	:	

COGAN, District Judge.

Before me is the motion of respondent PrimeFlight Aviation Services, Inc. ("PrimeFlight") for a stay of the Preliminary Injunction issued in this matter under § 10(j) of the National Labor Relations Act ("NLRA"), pending PrimeFlight's appeal to the Second Circuit. I assume the parties' familiarity with the facts of this case. For the following reasons, PrimeFlight's motion is denied.

In this Circuit, a court considers the following factors in determining whether to stay a judgment or order pending appeal: (1) that the movant is likely to succeed on the merits of its appeal, (2) that there will be irreparable injury in the absence of a stay, (3) that other interested parties will not be substantially harmed if the stay is granted, and (4) that the stay is in the public interest. In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007). PrimeFlight has not demonstrated the presence of any of these factors.

First, PrimeFlight has not offered any new legal arguments to support a showing that it is likely to succeed on the merits of its appeals. Rather, it makes the same arguments related to the

Court's jurisdictional finding, discounting the shift in the National Mediation Board's position that contractors of the same type as PrimeFlight are not covered by the Railway Labor Act. While PrimeFlight points me in the direction of a D.C. Circuit appeal currently *sub judice* on the jurisdiction issue, it does not provide me any new precedents or analyses that merit undertaking a reconsideration of my previous Order.

PrimeFlight similarly argues the same points it did regarding my finding on successorship under Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43, 107 S. Ct. 2225, 2236 (1987), specifically that there is reasonable cause to find that PrimeFlight was likely a successor to Air Serv. PrimeFlight's disagreements with my application of the facts to the legal test, without more, are not sufficient to merit reconsideration, as I have already considered respondent's arguments when it raised them the first time in opposing the preliminary injunction.

Second, PrimeFlight has not offered any concrete examples of irreparable harm if the stay is not granted. Instead, PrimeFlight abstractly argues that its right to choose not "to recognize and bargain" is under attack, as are the rights of the employees who did not elect to have the union represent them. Neither argument is persuasive when balanced against the harm expressly prohibited in the NLRA. Here, I found that there was reasonable cause to believe that unfair labor practices had occurred, and I deemed a preliminary injunction to be a just and proper *and temporary* remedy given the pending hearing before the Administrative Law Judge.

Third and related to the previous point, PrimeFlight's argument that the union will not be harmed by the stay is unpersuasive and is undercut by the observations I made in granting the Preliminary Injunction, specifically that there was reasonable cause to believe that PrimeFlight engaged in anti-union practices that chilled union activity, as supported by affidavits testifying to employee fears of being seen speaking to union representatives, attending meetings, or voicing

support in any meaningful way. PrimeFlight's motion does not acknowledge these aspects of third-party harm in its motion.

Fourth, PrimeFlight argues that the public interest favors a stay because the public is not served by a potential labor dispute. This is not sufficient. In passing the NLRA, Congress found that the public interest favors the protection of employee rights from unfair labor practices, and PrimeFlight has not shown how the risk of a potential labor dispute supersedes my observation that reasonable cause existed to believe that PrimeFlight had committed unfair labor practices.

When I balance the equities between PrimeFlight and the employees, giving due consideration to Congress's intent in passing the NLRA, the text of the Act, and the facts presented here, I find that the harm of the employees being unrepresented for a year or more is greater than having PrimeFlight engage in good-faith bargaining. Moreover, the Preliminary Injunction itself balances the equities between PrimeFlight and the union by imposing a limitation on bargaining over staffing levels in an effort to avoid imposing unduly burdensome obligations and costs on PrimeFlight. Therefore, there is no basis for a stay of the Preliminary Injunction, and PrimeFlight's motion is denied.

SO ORDERED.

U.S.D.J.

Dated: Brooklyn, New York
December 29, 2016